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No. 99-_____

In the Supreme Court of the United States

TEXAS TECH UNIVERSITY AND TEXAS TECH UNIVERSITY HEALTH SCIENCE CENTER,
Cross-Petitioners,
v.

UNITED STATES OF AMERICA EX REL.
CAROL REA COOPER FOULDS,
Cross-Respondent,
v.

UNITED STATES OF AMERICA,
Cross-Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Did Congress intend to include the States within its definition of the word "persons" in the False Claims Act, 31 U.S.C. § 3729 et seq. (West Supp. 1998) and, thereby, subject the States to liability for treble damages and civil penalties under the Act?[1]

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[1] This question is presented in *United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195 (2nd Cir. 1998), *pet. for cert. granted*, No. 98-1828 (June 24, 1999).

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CITATION TO CASE AS REPORTED BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 171 F.3d 279 (5th Cir. 1999). Appendix of Petitioner Foulds in No. 99-321 at 1 to 51. The district court's order denying Texas' Motion to Dismiss is reported at 980 F. Supp. 864 (N.D. Tex. 1997). Appendix of Petitioner Foulds at 52 to 76.

STATEMENT OF JURISDICTION

The opinion of the Fifth Circuit was entered on March 29, 1999. Fould's Petition for Rehearing was denied on June 1, 1999. Foulds filed her Petition for Writ of Certiorari on August 23 1999. The United States filed its Petition for Writ of Certiorari on August 27, 1999. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

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STATUTORY PROVISION INVOLVED

31 U.S.C. § 3729

False claims

(a) Liability for certain acts
Any person who–
(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval;
(2) knowingly makes, uses, or causes to be made or used, a false record or statement to

> get a false or fraudulent claim paid or approved by the Government;
>
> . . . .
>
> (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . . . A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

STATEMENT OF THE CASE

Carol Rae Cooper Foulds sued Texas Tech University and Texas Tech University Health Sciences Center, as well as other non-state entities, Lubbock County, Lubbock County Hospital District and the University Medical Center, asserting claims under the False Claims Act, 31 U.S.C. § 3729-3733 (West Supp. 1997) for alleged Medicare and Medicaid fraud. The United States declined to participate in the suit.

The False Claims Act creates a scheme in which a plaintiff who alleges independent knowledge of fraud against the federal government may initiate and prosecute a lawsuit using the name of the United States. 31 U.S.C. § 3729-3733 (West Supp. 1997). The suit is originally filed under seal and the federal government,

acting through the United States Attorney General, has the opportunity to investigate the allegations and to decide whether or not to intervene. 31 U.S.C. § 3730 (West Supp. 1997). If the federal government elects not to proceed with the action, the *qui tam* plaintiff has the right to conduct the action on her own behalf and on behalf of the government. 31 U.S.C. § 3730(c)(3) (West Supp. 1997). The original complaint may then be unsealed and the trial court may order that it be served on the named defendant(s). *Id.* § 3730(b)(3). A defendant may be liable for a civil penalty of not less than $5,000 and not more than $10,000 for each false claim, plus three times the amount of damages which the federal government sustains because of the act of that person (or two times the amount of damages in certain instances). *Id.* § 3729(a). The *qui tam* plaintiff is entitled to a share of the proceeds from the action or settlement, which varies from 15 to 30%, and is entitled to reasonable expenses, attorneys fees and costs. *Id.* § 3730(d)(1) and (2). All such expenses, fees and costs are awarded against the defendant. *Id.*

REASONS FOR GRANTING THE CROSS-PETITION

If this Court accepts the Petitions for Certiorari in this case, it is important that it consider the alternative question presented below by state defendants: whether Congress intended in the False Claims Act to extend liability to the states by including them in the term "person" in § 3729(a)(1). The Fifth Circuit decided that the Eleventh Amendment barred a *qui tam* relator's suit against a state when the United States did not intervene and determined, therefore, that it lacked the subject matter jurisdiction to proceed to decide the statutory question.

Feeling bound by its decision in *Ruhrgas*, the Fifth Circuit approached the problem presented by the False Claims Act

precisely but narrowly. *Marathon Oil Co. v. A.G. Ruhrgas,* 145 F.3d 211, 222-23 (5th Cir. 1998) (en banc), *rev'd* 119 S. Ct. 1563 (1999). Since Congress can subject a state to suit in the exercise of its Constitutional authority despite the state's sovereignty, whether Congress intended to create a cause of action against a state by a private party or by the federal government is "a . . . logical prerequisite to the jurisdictional inquiry." *United States ex rel. Long v. SCS Business & Technical Institute Inc.,* 173 F.3d 890, 894 (D.C. Cir., 1999) (*Long II*). *See Alden v. Maine,* 119 S. Ct. 2240, 2246-2248 (1999)

The Fifth Circuit's decision leaves open two questions which, while "live," implicate important federalism concerns and create uncertainty between the states and the federal government as they share responsibility for the administration of taxpayer programs: first, whether a *qui tam* suit under the FCA is allowed against a state if the United States intervenes at some point in the litigation; second, whether a suit under the FCA for treble damages and civil penalties is allowed against a state if commenced by the United States. The uniqueness of states in relation to other potential defendants who could be sued by the federal government under the FCA makes determining if Congress even intended to create a cause of action against states an inquiry into whether Congress saw the False Claims Act as an appropriate assertion of federal supremacy. If this Court determines that a state is not a "person" for the purpose of liability under the Act, these questions disappear and the Act becomes a pragmatic and logical exercise of Congressional power to punish private persons who defraud the government.[2]

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[2] Recent opinions have suggested other constitutional problems with the FCA. "[I]t should be noted that FCA qui tam suits stand on shaky constitutional ground with respect to the principle of separation of powers as embodied in Article II's Appointments and Take Care Clauses and Article III." *United*

1. The Court Should Resolve The Circuit Conflict Over Whether Congress Intended To Include The States Within Its Definition of "Persons" In The False Claims Act.

Resolution of the "persons" question is necessary because of a conflict in the circuits. The Eighth Circuit and the Second Circuit have found congressional intent to include the states in the definition of "person," and the District of Columbia Circuit has found no support for the inclusion.

The Eighth Circuit declined in *United States ex rel. Zissler v. Regents of The University of Minnesota*, 154 F.3d 865 (8th Cir. 1998) to apply the statutory presumption against including sovereigns in the term "person" stating that it applied only to the enacting sovereign and only when the purpose of the statute was in doubt. *Id.* at 874. The *Zissler* court perceived the FCA as having a broad remedial purpose which justified placing the burden on the state to show a specific exemption from the reach of the Act. In similar fashion, the Second Circuit found that the FCA did not alter the constitutional balance of federal and state power and refused to apply the "plain statement" rule explained in *United States v. Bass*, 404 U.S. 336, 349 (1971). *United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195 (2nd Cir. 1998), *pet. for cert. granted*, No. 98-1828 (June 24, 1999). *Stevens* reasoned that the goal of the FCA was to deter

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States ex rel. Stevens v. State of Vermont Agency of Natural Resources, 162 F.3d 195, 219 (2nd Cir. 1998)(Weinstein, J., dissenting). The Fifth Circuit acknowledged these concerns. *Foulds*, 171 F.3d at 292 n. 21.

One district court has determined that a *qui tam* plaintiff lacks standing. *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 982 F. Supp. 1261 (S.D. Tex. 1997)(No. 97-20948) (5th Cir. argued May 5, 1999). *See also Stevens*, 162 F.3d at 229 (Weinstein, J. dissenting).

and remedy fraud and because "the states have no right or authority, traditional or otherwise, to engage in such conduct," no federalism concerns were implicated. *Id.* at 203. However, the D.C. Circuit accepted that "states are excluded from the term person absent an affirmative contrary showing" and found no textual support or support in the legislative environment or in the legislative history for including states in the term "person" in the FCA. *United States ex rel. Long v. SCS Business and Technical Institute, Inc.*, 173 F.3d 870 (D.C. Cir. 1999)(*Long I*).

False Claims Act litigation is expensive for states and exposes the state fisc to significant liability. As the *Foulds* court noted, Foulds alleged over 400,000 false claims based on incorrect Medicare and Medicaid billings, each of which could bring fines between $5,000 and $10,000, and the trebling of $20 million in overpayments. 171 F.3d at 282 n.1. If the state is subject to the FCA, it could face between $2 billion and $4 billion in fines and $60 million in damages. It is bad public policy to burden blameless taxpayers with huge damage awards for the supposed benefit of the federal government. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 263, 266-67 (1981) (recognizing that "[n]either reason nor justice" suggests that retribution in the form of punitive damages should be visited upon blameless and unknowing taxpayers). Application of the Act in the *Foulds* situation is not even justified by reasoning that one state should not be allowed to siphon off funds fraudulently that could otherwise be distributed to the remaining states. The confusion surrounding the federal regulations which is the basis for Foulds' allegations of fraud have been the subject of a nationwide initiative by the OIG known as Physicians at Teaching Hospitals (PATH) audits which have left few states untouched by potential FCA liability at their state-run teaching hospitals. *See* Steven J. Chananie, *AAMC, Other Professional Organizations File Suit to End PATH Audits,* 10 N.Y. HEALTH L. UPDATE 4 (1997).

Inevitably, the federal government's continued delegation of responsibility to states to administer federal programs, under the policy of "New Federalism," exposes states to a broad range of potential liability.[3] If the FCA can be applied to the states, the federal fisc is positioned not only to recoup dollars that were inappropriately paid out, but to collect a windfall from state taxpayers hundreds of times greater than the overpayment.[4] "It is reasonable to apply more stringent requirements to debts owed by private persons and to keep the more flexible common law in place for debts owed by state and local governments." *United States v. Texas,* 507 U.S. 529, 536 (1993).

Under basic rules of statutory construction, states should not be considered "persons" when that term is used in 31 U.S.C. §

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[3] *See* Thomas S. Ulen, *Economic & Public Choice Forces in Federalism,* 6 GEO. MASON L. REV. 921 (1998) (discussing the shift of responsibility for administering federal programs to states); *United States ex rel. Churchill v. NHIC,* No. 98-50605 (5th Cir. mandate stayed Aug. 31, 1999) (involving three state agencies, the Tex. Dep't of Health, the Tex. Dep't of Human Services and the Tex. Comm'n on Health and Human Services and litigating whether it was fraud in the administration of Medicaid and Medicare dollars for the state not to require greater recovery in subrogation by the fiscal intermediatry, NHIC).

See Stevens (Weinstein dissenting) 162 F.3d at 225-228 (discussing the damage done by a coercive weapon like the FCA to the cooperative relationship that is necessary for administration by the states of federal programs).

[4] All federal programs which send money to the states have ample safeguards to require refund of monies if they have been incorrectly applied. *See* 42 U.S.C. § 1395(u) and (hh); *United States v. Texas,* 507 U.S. 529 (1993); *Bennett v. Kentucky Dept. of Ed.,* 470 U.S. 656, 662 (1985); *Bell v. New Jersey,* 461 U.S. 773, 790 (1983); *Mount Sinai Hospital of Greater Miami, Inc. v. Weinberger,* 517 F.2d 329 (5th Cir. 1975), *cert. denied,* 425 U.S. 935 (1976).

3729(a)(1), the liability-creating section of the FCA. The word "person" is not defined generally in the Act or for purposes of this section and there is no reference to "states" in this section. Section 1 of Title 1 of the United State Code–Rules of Construction dictates that "[when] determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." Missing from this broad application of the word "person" are states, state entities or other governmental entities.

The statutory language of the False Claims Act only includes the states in its definition of a "person" as it pertains to civil investigative demands under 31 U.S.C. § 3733.[5] Section 3733, added in 1986, plainly states that the definitions contained there apply "[f]or purposes of this section." *See* § 3733(1).[6] The fact that "person" is defined as including a state entity for "purposes of this section [§ 3733]" argues against congressional intent to include the states within the scope of "person" in the liability-creating sections of the Act. 31 U.S.C. § 3733(l)(4). "[W]here

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[5]Because states are frequently partners in the disbursement of federal funds under New Federalism, it is not surprising that Congress saw fit to provide that the Department of Justice could confidentially get information from them without court involvement or complaints about the cost during the process of deciding whether grounds exist for initiating false claim actions against private contractors.

[6] When Congress added § 3733 to the FCA it borrowed the provision from the Hart-Scott-Rodino Antitrust Improvement Act of 1976. The legislative history for the Hart-Scott-Rodino Act explains that the civil investigative demand provisions of that Act are intended to reach "'target and non-target' third parties with relevant information." H. R. REP. No. 94-1343 (1976).

Congress include[s] particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991)(citations omitted).

The Court in 1979 noted that "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." It observed that this was "[p]articularly... true where the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage."[7] *Wilson v. Omaha Tribe*, 442 U.S. 653, 667 (1979) (internal quotes and citations omitted) (construing a statute which prevented and provided remedies against non-Indian squatters on Indian lands). The Court repeated the rule that in ordinary usage the term "person" does not include states in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). *Will* also noted that the Congress of 1863, when the False Claims Act was originally enacted, would not have assumed that "person" included states. *Will*, 491 U.S. at 68 nn. 8 & 9.

The False Claims Act was intended "to stop the massive frauds by large contractors, during the Civil War." *United States v. Bornstein*, 423 U.S. 303, 309 (1976). As originally enacted, it mandated imprisonment, a remedy which could not apply to a

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[7] Relying on *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941), *Wilson* went on to note that there was "no hard and fast rule of exclusion, and much depends on the context, the subject matter, legislative history, and executive interpretation." *Wilson*, 442 U.S. at 667. However, in *International Primate Protection League v. Admin. of Tulane Educational Fund*, 500 U. S. 72, 83 (1991), the Court put *Cooper* in context by characterizing the rule that the word "person" does not include the sovereign as a presumption that must be overcome.

state. Act of March 2, 1863, ch. 67 § 3, 12 Stat. 698. The word "person" in the section creating civil liability in the Act has not been amended since it was originally enacted in 1863.

Nor does the legislative history of the Act suggest congressional intent to subject states to suit. This is highlighted by the sponsor of the Act, Senator Howard, who said the purpose of the Act was to

> hold out to a confederate a strong temptation to betray his coconspirator, and bring him to justice. . . . I have based the [provisions] upon the old-fashioned idea of holding out a temptation, and "setting a rogue to catch a rogue" which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.

Cong. Globe, 37th Cong., 3d Sess. 955-56 (1863) (cited in *Foulds*, 171 F.3d at 293). The House Select Committee, which investigated Civil War fraud prior to the passage of the FCA, issued a report in December of 1861 that discussed allegations of "personal aggrandizement" on the part of state officials in Indiana, Ohio, New York and Illinois. The discussion of the problem does not reveal any intent to subject the states to liability for fraud but, instead, shows that states were thought of as partners in "demand[ing] the highest integrity of those invested with public trusts, and each [the states and the federal government] should hold their agents, by rigid scrutiny, to severe accountability." H.R. REP. No. 2, part 2 (1862).

The False Claims Act was amended in 1986 and the definition of "person" was not changed to include states. Pub. L. 99-562 § 3, Oct. 27, 1986, 100 Stat. 3153. The amendments to the FCA

were passed by the same Congress that passed the Program Fraud Civil Penalties Act (PFCPA), 31 U.S.C. § 380, *et seq.* and the Anti-Kickback Act of 1986, 42 U.S.C. § 52(3). These Acts create liability for similar conduct. The PFCPA and the Anti-Kickback Act define "person" and their definitions also do not include states. In fact, in each of these Acts, the word "organization" is clarified by the word "private." The traditional statutory construction principle of *in pari materia* establishes that the use of a word in one statute which is *in pari materia* with another statute is persuasive of its meaning in the other. *United States v. Rodriguez*, 60 F.3d 193, 196 (5th Cir. 1995), *cert. denied*, 516 U.S. 1000 (1995). When Congress uses the same forms of statutory language in different statutes having the same general purpose, courts presume that Congress intended the same interpretation to apply in each instance. *Northcross v. Bd. of Ed.*, 412 U.S. 427, 428 (1973).

The only legislative history supporting the inclusion of states as defendants in the FCA is not deserving of any weight. *Long I*, 173 F.3d at 878. The Senate Report that accompanied the 1986 amendments noted that the False Claims Act "reaches all parties who may submit false claims. The term 'person' is used in its broad sense to include partnerships, associations, and corporations . . .as well as states and political subdivisions." S. REP. No. 99-345, at 8 (internal citations omitted). This statement is not entitled to any weight because it does not describe the 1986 amendments but is part of the "history of the False Claims Act and Court Interpretation" section which was a repeat of a background discussion contained in an earlier Senate Report which had accompanied a failed effort to amend the False Claims Act in 1979-80. Compare S. REP. No. 99-345 at 8-10 with S. REP. No. 96-657 at 2-4. At the time the statement was written, it was incorrect because there was no legislative evidence or case on point indicating that "person" in the False Claims Act included the

states. The one court that had addressed the issue in a case, which admittedly has no precedential value, held that states were not "persons" under the Act. *United States ex rel. Weinberger v. Florida*, No. TCA 77-0873 (N.D. Fla. Apr. 21, 1978), *vacated for lack of jurisdiction*, 615 F. 2d 1370 (5th Cir. 1980); *see Long I*, 173 F.3d at 879. The language from S. REP. No. 99-345 was irrelevant to the proposed amendments, and the report's "section-by-section" analysis did not describe the liability provision of the Act, 31 U.S.C. § 3729, as subjecting the states to any liability, even though that section was amended to increase the double damage provision to a treble damage provision and to enhance the civil penalties.

If there is no ambiguity when a statute is read in its natural way, the inquiry should end. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *See also Mississippi Poultry Ass'n., Inc. v. Madigan*, 31F.3d 293, 299 (5th Cir. 1994). A plain reading of 31 U.S.C. § 3729(a)(1), the liability creating section of the FCA, does not indicate that states are subject to liability. Even if the Court considers the *Cooper* factors (purpose of the statute, subject matter, context, legislative history and executive interpretation), it should conclude that states were not intended as defendants in the FCA. *See United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941).

However, if the Court determines that the statute is ambiguous, the rule of *Hilton v. South Carolina Public Railways Comm'n.*, 502 U.S. 197, 206 (1991), instructs that "a plain statement" rule should be used to interpret federal statutes which, if applied to states, could subject them to monetary liability.[8] Thus, absent a

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[8] *Hilton* did not apply the "plain statement" rule because of *stare decisis* and the reliance that had been placed on a previous construction of the Federal Employers' Liability Act (FELA). However, in resting on stare decisis, *Hilton*

clear statement that a statute applies to the states, a court should find that the statute does not apply. As observed in *Will*, when Congress "intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so unmistakably clear in the language of the statute." *Will*, 491 U.S. at 65. *Will* explicitly notes that this rule cannot be limited to Eleventh Amendment cases. *Id.* *Gregory v. Ashcroft*, which is not an Eleventh Amendment case, relies on the same line of cases relied on by *Will* for the proposition that the "plain statement rule is nothing more than an acknowledgment that the states retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461. The requirement of a clear statement exists even when the suit is brought by the federal government.[9] Citing *Pennhurst*,[10] *Will* noted that Congress should make its intention clear if it intends to impose a condition on the grant of federal moneys. *Will*, 491 U.S.

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acknowledged that in most cases *Will* and *Gregory v. Ashcroft*, 501 U.S. 452 (1991), should be followed. *Hilton*, 502 U.S. at 566. Additionally, *Hilton* relied on *Parden v. Terminal Rwy.*, 377 U.S. 184 (1964), which has been overruled. *See College Savings Bank v. Florida Prepaid Post Secondary Education*, 119 S. Ct. 2219 (1999).

[9] The "real party in interest" analysis applied by the Eighth Circuit is irrelevant to determining Congressional intent to include states as parties subject to liability in drafting the False Claims Act. *Zissler*, 154 F. 3d at 872. For purposes of determining whether applying the FCA to the states affects the federal-state balance, Texas maintains that the treble damages and civil penalties are enough of an intrusion on federal-state relations to require applicability of the "clear statement" rule.

[10] *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 16 (1981).

at 65. The general rule is stated in *United States v. Bass*, 404 U.S. 336, 349 (1971), also cited in *Will*,

> [in] traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

Id. Far from a "clear statement, as the Fifth Circuit observed, "no relevant provision of the Act explicitly mentions states as defendants." *Foulds*, 171 F.3d at 294.

If Congress intends to treat states as if they could be guilty of fraud against the federal government, and if it intends to subject the states' treasuries to the treble damages and civil penalties of a statute like the FCA, it should be obligated by federalism concerns to state its intention clearly. If the rule established by *Wilson* and *Will* has any meaning at all, it must create at minimum a default rule; states are excluded from the term "person" absent an affirmative contrary showing. *Long I*, 173 F.3d at 874.

CONCLUSION

Cross-Petitioners respectfully request, if the Court grants Foulds' petition in No. 99-321 or the United States' petition in 99-365, that it also grant this cross-petition and affirm the judgment of the Fifth Circuit.

Respectfully submitted,

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